89-214

Supreme Court, U.S.
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No. 89-____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

THOMAS EARTH,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is a ranking on a civil service promotional roster a property interest protected by the Due Process Clause of the Fourteenth Amendment?

2. Is a ruling by a district judge in favor of a white litigant subject to any different standard of review than the same judge's ruling in the same case in favor of a black litigant?

3. Does a district judge, who for ten years has been supervising a quota remedy in a Title VII case, abuse his discretion in correcting "a mysterious happenstance which can happen only in Chicago?"

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v.

CITY OF CHICAGO,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Thomas Earth respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 22, 1989.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-12) is reported at 869 F.2d 1033 (7th Cir. 1989). The opinion of the district judge (App. 17-18) is unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 13) was

entered on February 22, 1989; petitioner's timely petition for rehearing was denied by the court of appeals on May 5, 1989. (App. 14.)

CONSTITUTIONAL PROVISION

This case involves the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States

STATEMENT

In 1973, the United States filed a lawsuit against the City of Chicago, complaining of a pattern and practice of discrimination on the basis of race and sex in the hiring and promotion of police officers. The district court found in favor of the government. *United States v. City of Chicago*, 411 F.Supp. 218 (N.D.Ill. 1976), *aff'd* 549 F.2d 415 (7th Cir. 1977).

Since 1977, promotions to sergeant in the Chicago police department have been made subject to quotas. See *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981) (en banc). The quotas were superimposed on eligibility lists; promotions have been made in "rank order from eligibility lists compiled pursuant to Illinois law." *United States v. City of Chicago*, 853 F.2d 572, 576 (7th Cir. 1988).

In the seven year period following posting of the 1979 sergeant's promotional roster, the City secured the district court's approval for 433 promotions to sergeant.

In December of 1986, shortly before obtaining the district court's approval for what would be the last 80 sergeant promotions from the 1979 list, the City changed the rankings of

two police officers — one black, one white — on the 1979 list. The "adjustments" were made by correcting "errors" in performance ratings for 1976 and 1977.

In October of 1987, William Drawhorn, a black police officer, complained to the district court about the "correction" of rankings. The district court ordered Drawhorn's promotion, describing the "correction" of rankings as "a mysterious happenstance which can happen only in Chicago" (App. 15) and concluding that Drawhorn had been "clearly entitled to promotion." (App. 16.) The City did not appeal the order directing it to promote Drawhorn.

After Drawhorn had secured relief, petitioner, the white police officer who had been passed over because of a belated "correction," sought the same remedy. As it had ordered for the black officer, the district court ordered petitioner's promotion. (App. 17-18.)

The City appealed the order directing petitioner's promotion. A panel of the Seventh Circuit reversed, holding that persons on promotional rosters do not have a legitimate expectation that "the City will not revise ranks after publication" (App. 9) and that the City of Chicago has unlimited "discretion to revise roster rankings." (App. 9 n.5.) The Court of Appeals distinguished the district court's unappealed order directing the promotion of Drawhorn, the black police officer, in a cryptic footnote (App. 11 n.6):

> Because both Earth and Gandurski are white males the City's revision of the roster rankings cannot of itself be classified as a clandestine attempt to avoid the minority or gender promotional quotas imposed by the court. This case therefore stands in contrast to petitions for intervention files by black and

hispanic officers, cited by appellant, complaining that the City changed their minority status or altered their roster ranking without notice.

REASONS FOR GRANTING THE WRIT

1. RANKING ON A CIVIL SERVICE PROMOTIONAL ROSTER IS A PROPERTY INTEREST

The decision of the Seventh Circuit in this case, if allowed to stand, undermines the basic tenets of the civil service promotional system throughout this country.

The concepts of merit and fairness that are the underpinning of the civil service promotional system depend on the right of each applicant who passes an examination to be considered for promotion. The accepted and ordinary rule is that once an eligibility list has been published, a civil service commission may not change the eligible candidate's relative rankings. *Beccia v. City of Waterbury*, 192 Conn. 127, 470 A.2d 1202 (1984); *Day v. Gerds*, 54 Mich.App. 547, 221 N.W.2d 221 (1974); *State ex rel. Hearty v. Mullin*, 198 Wash. 99, 7 P.2d 280 (1939); 3 McQuillan, *Municipal Corporations* (3d Ed. 1982), § 1982.

A candidate's relative ranking on a promotional roster satisfies the "hallmark of property . . . an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982). With the exception of the decision of the Seventh Circuit in this case, courts that have considered this question have uniformly held that an applicant who has passed a test and been placed on an eligible list has a property right in being considered for promotion. See, e.g., *Drogan v. Ward*, 675 F.Supp. 832 (S.D.N.Y. 1987); *City of*

Riviera Beach v. Fitzgerald, 492 So.2d 1382 (Fla. 1986); *Firemen's and Policemen's Civil Service Commission v. Williams*, 518 S.W.2d 615 (Tex. Court of Civil Appeals, 1975).

In holding that Illinois law does not recognize "a binding right to or property interest in a roster position" on a civil service promotional list (App. 9) and in concluding that the City of Chicago is free to "correct" efficiency ratings and alter rankings on a promotional roster seven years after it had been posted (App. 9 & n.9), the Court of Appeals mistakenly relied on a single Illinois case, *McCoy v. Board of Fire and Police Commissioners*, 79 Ill.App.3d 742, 398 N.E.2d 1020 (1979). *McCoy*, however, was concerned with a promotion claimed by a police officer who had been fired and was seeking judicial review when promotions were made. *McCoy* has nothing to do with the accepted and ordinary rule, long recognized by Illinois courts, that rankings on a promotional roster have "legal significance."

In *People ex rel. Gaynor v. Board of Fire and Police Commissioners*, 14 Ill.App.2d 329, 144 N.E.2d 763, 767 (1957), after a promotional roster had been posted, the Board concluded that seniority, one of the factors used in determining rankings, should be weighted in a different manner. "The result . . . was to drop plaintiffs to places on the list considerable lower than those held on the basis of the original markings." 144 N.E.2d at 766.

Under the rule adopted by the Seventh Circuit in this case, the plaintiffs in *Gaynor* would not have had a judicial remedy. The Illinois Appellate Court ruled to the contrary, holding that after a promotional roster has been posted "that list had legal significance." 144 N.E.2d at 767. The state court relied on sound policy considerations in reaching this

result:

> It would becloud all civil service examinations if a change of mind were permitted after the results of an examination were made known and the discontent of those who had lost out could make itself felt. 144 N.E.2d at 767.

The accepted and ordinary rule that rankings may not be changed on a promotional roster was also applied by the Illinois Appellate Court in *Mulcrone v. O'Connor*, 13 Ill.App.2d 549, 142 N.E.2d 794 (1957), where a police officer complained that a mistake had been made in the efficiency rating that had been used to compute his standing on a promotional roster. The officer had complained about the error before the posting of the roster, 142 N.E.2d at 796, but the mistake was not corrected when the list was posted. Id. The Illinois Appellate Court held that the efficiency score could be corrected but that no change could be made in rankings on the promotional roster. Id. at 797. The court relied on a specific regulation of the Civil Service Commission governing review of efficiency ratings,[1] id., and on policy considerations:

> Further, the reasonableness of this regulation is apparent when it is realized what chaos could result

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1. The successor to the Civil Service rule discussed in *Mulcrone* is Rule XII, Section 6 of the Chicago Personnel Rules. This rule requires that any challenge to a performance rating must be initiated within "7 calendar days of the date the employee signed the evaluation." The panel viewed this rule as irrelevant because it "does not limit in any way the City's discretion to revise roster rankings." (App. 9 n.5.)

> if any substantial number of the 4,000 police officers who took the examination would, after the posting of the promotional list, question the Commissioner's discretion in assessing their efficiency mark. Plaintiff waited until it was too late to file his complaint.
> 142 N.E.2d at 797.

The principle applied in *Mulcrone* that "errors" in performance ratings cannot be corrected after a promotional roster has been posted has been consistently applied by the Illinois court. See *Lennert v. Wilson*, 56 Ill.App.2d 235, 206 N.E.2d 294 (1965) and *People ex rel. Cronin v. Cahill*, 118 Ill.App.3d 18, 254 N.E.2d 161 (1969). If this principle had been applied in this case, petitioner would not have been deprived of his rank on the promotional roster and would have been promoted.

There are sound policy reasons to support the prevailing rule that rankings may not be changed after a promotional roster has been posted. A rank order list "satisfies a felt need for objectivity."[2] *Guardians Association of New York City v. Civil Service Commission*, 630 F.2d 79, 100 (2d Cir. 1980). The Illinois rule prohibiting 10 year after the fact "corrections" in rankings minimizes the possibility of chicanery, or, as the district judge wrote, "a mysterious happenstance which can happen only in Chicago."[3] (App. 15) The decision

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2. Each of the 433 promotions made from the 1979 list was made, subject to quotas, in strict rank order sequence, without regard to the "rule of three" or the "rule of five" referred to by the Seventh Circuit. (App. 8 n.4.)

3. The ten year after the fact correction in Gandurski's performance rating was based on Gandurski's claim that his score for one of four rating periods had been improperly lowered from 85 to 80. This

of the Seventh Circuit in this case is in direct conflict with the decision of the Illinois Appellate Court in *People ex rel. Gaynor v. Board of Fire and Police Commissioners,* 14 Ill.App.2d 329, 144 N.E.2d 763, 767 (1957) and *Mulcrone v. O'Connor,* 13 Ill.App.2d 549, 142 N.E.2d 794 (1957). In a subsequent decision in this litigation, the Seventh Circuit described an applicant's interest in promotion as a "confident expectation," something less than property right. *United States v. City of Chicago* 870 F.2d 1256, 1260 (7th Cir. 1989). Illinois law, in accord with uniform decisions in other jurisdictions, views this "confident expectation" as an entitlement that cannot be removed except for cause. Certiorari should be granted to resolve the conflict between the state and federal courts, a conflict that undermines the basis tenets of the civil service promotional system throughout this country.

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claim was supported by an unsworn statement dated November 19, 1986 in which Gandurski's then supervising sergeant states that he recalls that in December of 1976, he had given Gandurski a rating of 85. Although the Court of Appeals stated that petitioner had failed to prove that the belated correction was improper (App. 12), the district court was aware of the rule and custom of the Chicago police department that required, on the rear of the performance rating card, a written explanation for a performance rating of 85 and above. There is no such explanation on the rating card that Gandurski claimed was lowered from 85 to 80. The correction of Gandurski's score remains "a mysterious happenstance which can happen only in Chicago." (App. 15)

2. THE STANDARD OF REVIEW SHOULD BE SAME FOR BLACK AND WHITE LITIGANTS

A district court has "broad equitable discretion to devise prospective relief designed to assure that employers found to be in violation of [Title VII] eliminate their discriminatory practices and the effects therefrom," *Teamsters v. United States*, 431 U.S. 324, 361 n.47 (1977), For more than ten years, the Seventh Circuit has regularly deferred to Judge Marshall's discretion in supervising his decrees concerning hiring and promotions in the Chicago police department.

In 1977, the Court of Appeals upheld Judge Marshall's decision to impose quotas on hiring and promotion. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977). Later that year, the Court of Appeals upheld Judge Marshall's order prohibiting the City from making further appointments from its 1971 hiring list. *United States v. City of Chicago*, 567 F.2d 730, 734 (7th Cir. 1977). In 1980, the Seventh Circuit upheld Judge Marshall's order prohibiting the City from making further promotions from the 1973 sergeant's list. *United States v. City of Chicago*, 631 F.2d 469 (1980). In 1985, the Court noted that Judge Marshall had been "immersed in the issues of this case for more than a decade" and upheld his decision refusing to readjust the promotional quota at the behest of black female police officers. *United States v. City of Chicago*, 796 F.2d 205, 211 (1985).

In this case, however, the Seventh Circuit refused to defer to Judge Marshall's discretion and suggested at note 7 that it would have reached a different result if petitioner had been black or hispanic. The same standard of review, however, should be applied without regard to a litigant's race.

Judge Marshall's order directing the promotion of William Drawhorn, the black police officer, cannot be distinguished from his order directing the promotion of petitioner, a white police officer. Both Drawhorn and petitioner "were clearly entitled to promotion." (App. 16.) Each had been displaced from the promotional roster by a ten year after the fact "corrections" in performance ratings. (App. 15, App. 17.) Neither Drawhorn, petitioner, nor the district judge had notice that the roster had been altered. (App. 16, 18.)

Elementary principles of equal protection require that the district judge's order directing petitioner's promotion be reviewed by the same standard as the judge's ruling in favor of Drawhorn. The decision of the Court of Appeals is an unwarranted departure from this rule and should be corrected by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

July, 1989

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APPENDIX-

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-1936

UNITED STATES OF AMERICA,

Plaintiff,

THOMAS W. EARTH,

Intervening Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 73 C 2080—**Prentice H. Marshall,** *Judge.*

ARGUED NOVEMBER 8, 1988—DECIDED FEBRUARY 22, 1989

Before CUMMINGS, WOOD, and COFFEY, *Circuit Judges.*

COFFEY, *Circuit Judge.* This is another chapter in the lawsuit challenging the hiring and promotion practices of the Chicago Police Department. Plaintiff-appellee Thomas Earth was allowed to intervene in the suit on the ground that he was passed over for promotion to sergeant in violation of a court order directing that promotions be made according to rank on the 1979 sergeant's eligibility roster. Earth claimed he would have been promoted but for a recalculation of another officer's ranking one week before the promotions were made public. The district judge

agreed with Earth's argument and granted his Petition for Promotion with back pay and benefits to December 5, 1986. We reverse.

Procedural History

On August 14, 1973, the United States filed an action under Title VII of the Civil Rights Act of 1964, 28 U.S.C. § 2000e *et seq.*, and other civil rights statutes, alleging discrimination in the hiring and promotional practices of the Chicago Police Department. Based on a finding of racial and sexual discrimination in hiring and promotion, Judge Prentice Marshall ordered various forms of relief, including that forty percent of future promotions to sergeant be reserved for eligible black or Spanish surnamed officers (1976 decree).[1] Eligible officers were those whose names appeared on the 1973 sergeant's eligibility roster, based on the 1973 Chicago Civil Service Commission's sergeant's examination, as well as departmental efficiency ratings and seniority. This court affirmed the finding of discrimination and imposition of mandatory hiring and promotional quotas. *United States v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977). The district court subsequently permitted the City to strike the 1973 sergeant's eligibility roster and we held that that order was not inconsistent with Illinois law. *United States v. City of Chicago*, 631 F.2d 469, 472-73 (7th Cir. 1980). A new roster was posted in 1979 and an *en banc* panel of this court held that changed circumstances required modification of Judge Marshall's 1976 decree to reduce the minority promotional quota from forty percent to twenty-five percent. *United States v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981). In 1982, Judge Marshall ordered that five percent of promotions to sergeant be reserved for women regardless of race. App. Rec. #1077.

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[1] Judge Marshall, who has presided over the case from its inception, has since ruled on numerous petitions for intervention and promotion, including the petition for promotion filed by Thomas Earth.

On December 17, 1986, the City informed the district court that it was making promotions to sergeant from the roster list in accordance with the 70%/25%/5% white male/minority male/female quotas prescribed by the court. Given eighty anticipated promotions, the quotas required the promotion of twenty minority males, four females (white or non-white) and fifty-six white males. As of December 1, 1986 Earth had the fifty-sixth highest rank among white males awaiting promotion. At that time, the City, after discovering an error in the computation in Officer Joseph Gandurski's performance rating,[2] advanced Gandurski (a white male) one position ahead of Earth on the promotional eligibility list. As a result of the re-computation and advancement of Gandurski, Earth dropped to fifty-seventh on the eligibility list. Gandurski received the promotion.

On February 1, 1988, Earth filed a Petition to Intervene in the ongoing 1973 discrimination lawsuit, along with a Petition for Promotion and Other Relief, both on the ground that "he was passed over for promotion to sergeant because the City of Chicago failed to comply with the Court's orders superimposing a quota on the rank order list prepared from the results of the 1979 sergeant's test." He further claimed that "if Mr. Gandurski was promoted over petitioner because an 'error' had been corrected, this correction should not have been undertaken without notice to petitioner and leave of Court to dispel any question of chicanery."

The City did not object to Earth's intervention but did respond to his Petition for Promotion with an explanation for the advancement of Gandurski's ranking:

> "In late 1976[3] pursuant to an internal investigation within the City's Police Department and the Depart-

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[2] Roster rankings are determined according to seniority and a weighted composite of three scores: a written sergeant's examination (40%), an oral interview (30%) and performance ratings (30%). Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; App. Rec. #1232, p. 2.

[3] The City has advised us that this should read "In late *1986*."

ment of Personnel, it was determined that the performance rating of patrol officer Joseph F. Gandurski for the period July through December, 1976 had been apparently altered without explanation. The score had been changed from 85.0 to 80.0 (Copy of rating card attached as Exhibit A). The investigation was triggered by a letter from officer Gandurski to former Police Superintendent Fred Rice dated October 21, 1986. (Copy of letter attached as Exhibit B). Officer Gandurski's letter was part of his attempt, ongoing since 1977, to correct what he believed to be a serious error which was having a detrimental affect [sic] on his career in the police department, specifically, on his rank on the 1979 sergeant's eligibility roster.

The City's investigations revealed information leading it to conclude that it was more likely than not that office [sic] Gandurski's performance rating was altered without justification. The sergeant who rated officer Gandurski acknowledged that he recalled giving a grade of 85.0 to the officer's performance for the period in question. (Copy of memorandum attached as Exhibit C). Officer Gandurski's performance ratings both before and after the period in question were in the 80's and lower 90's. Furthermore, the supervisor who would have approved the 1976 performance ratings had long since retired at the time of the investigation.

Based on the foregoing in November, 1986, the City made the decision to correct the 1976 performance rating which changed officer Gandurski's overall efficiency rating from 83.47 to 83.85. The correction resulted in a change in officer Gandurski's rank from 577 to 536 on the sergeant's eligibility list. (Order attached as Exhibit D).

The City's correction of officer Gandurski's 1976 performance rating was not the result of 'chicanery' as cavalierly suggested by the petitioner [footnote omit-

> ted]. Rather, it was a decision made after an investigation which revealed that it was the equitable thing to do. It was also a decision which did not in any way violate this court's orders that promotions be made in rank order from existing eligibility rosters with appropriate remedial quotas."

Notwithstanding the City's explanation, Judge Marshall granted Earth's Petition for Promotion and awarded full back pay and benefits. Judge Marshall stated:

> "We have concluded that the objections are not well founded and the petition should be granted. On December 17, 1986, it was represented to us that eighty promotions to the rank of sergeant had been made from the roster which we had earlier approved applying the quotas which had been adopted in April of 1984. We were not told that the roster had been altered with the result that Gandurski jumped Earth and Earth was excluded from promotion. Neither was Earth. Earth had a protectible interest in his position on that roster. He was deprived of that interest without any notice or opportunity to be heard. And we were induced to promote from a roster which had been altered without any notice to us. In these circumstances we believe equity compels that Earth be promoted to the rank of sergeant in the Chicago Police Department with full back pay and benefits to December 5, 1986."

On May 31, 1988, this court denied Earth's motion to dismiss the City's appeal of Judge Marshall's order and also granted the City's emergency motion to stay implementation of the order pending the outcome of this appeal.

DISCUSSION

The City on appeal presents a three-pronged attack on Judge Marshall's ruling initially claiming that Earth has no protectible interest in his rank on the 1979 sergeant's eligibility roster. Next, arguing that even if Earth has

a protectible interest in his position on the roster he was not deprived of that interest without due process. Finally, the City contends that Earth was entitled to no more than nominal damages even if he was deprived of a property interest without due process of law.

Earth urges at the outset that we should not reach the merits of any of those contentions because they are raised for the first time on appeal. Earth's petitions to intervene and for promotion failed to assert a property interest in promotion, but rather argued that the City had "failed to comply with the Court's orders" regarding rank order promotion from the 1979 roster. The City did not address the property interest issue in its brief in response to the motions. The City simply argued that it had advanced Gandurski to his proper rank after correcting the roster for good cause. Earth claimed a property interest in his roster ranking, for the first time, in his reply brief in the district court. Even though Earth failed to raise the issue in his principal brief, Judge Marshall relied on this newly conceived theory in his minute order granting Earth's petition for promotion. This is not a case where the district court failed to consider an issue because the appellant did not raise it below. To the contrary, Judge Marshall's decision is premised on a property rights theory. It is folly for Earth to assert that an appeals court on review of a district court judgment cannot consider the merits of each and every theory the district judge relied upon in deciding the case. *See Toney v. Burrus*, 829 F.2d 622, 626 (7th Cir. 1987) (waiver rule does not apply to the law on which a decision is based).

Turning to the merits, the City contends, based on *Bigby v. City of Chicago*, 766 F.2d 1053 (7th Cir. 1985), that Earth has no protectible interest in his rank on the 1979 roster. In *Bigby*, a group of black police sergeants brought suit against the City under Title VII alleging that the City had discriminated against them by refusing to promote them to lieutenant, because they failed to achieve a qualifying score on the lieutenant's examination which

they contended was racially biased. A group of white and hispanic police sergeants sought and were allowed to intervene in the suit on the ground that it was not "job-related" and therefore violated the intervenors' rights under the Due Process Clause of the Fourteenth Amendment. The district court after argument agreed that the exam was discriminatory and ordered the immediate promotion of eleven black sergeants to lieutenant. However, the court refused to order promotion of the intervenors because, though the examination was invalid under Title VII, it was not arbitrary or capricious and so did not warrant relief under the Fourteenth Amendment. The intervenors appealed. We held that the intervening sergeants had neither a property nor liberty interest in a fair promotional exam or in "the rank, which they have not yet attained, of lieutenant." *Id.* at 1056. One passage in *Bigby* is particularly instructive here:

> "[T]he promoting officials are authorized to choose among the highest-rated applicants, and no criteria are provided for that choice. *See* Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13; Chicago Municipal Code ¶ 25.1-5(5) (1977). Construing the counterpart provision in the statute governing the police forces of smaller municipalities, *McCoy v. Board of Fire and Police Comm'rs*, 79 Ill. App. 3d. 742, 744, 35 Ill. Dec. 70, 72, 398 N.E. 2d 1020, 1022 (1979), holds that 'the promotion of a patrolman to sergeant is one of discretion,' so that the plaintiff 'had no vested right to promotion.' The same is true of promotion from sergeant to lieutenant. Indeed it is more strongly true, since discretionary factors loom larger as one moves up on a hierarchy. Promotion to lieutenant's rank is not a matter of right and is not governed by fixed rules which if complied with automatically entitle the applicant to promotion. 'To have a property interest . . . a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate *claim of entitlement* to it.' [citation omitted]"

Bigby, 766 F.2d at 1057.

As we explained in *Bigby*, Illinois law does not create an entitlement to promotion, because Ill. Rev. Stat. 1981, ch. 24, ¶ 10-1-13 and Chicago Municipal Code § 25.1-5 give the promoting authorities unfettered discretion to choose from among the five highest rated applicants for each available promotion.[4] *See also Miller v. Henman*, 804 F.2d 421 (7th Cir. 1986) (when there are no binding substantive criteria, when a decision cannot be "wrong," there is no constitutionally protected property interest.) Thus, even assuming that Earth was the 56th highest ranking white male, it would be proper for the City to promote

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[4] Ill. Rev. Stat. ch. 24, ¶ 10-1-13 provides in relevant part:

> "The Commission shall, by its rules, provide for promotions in such classified service, on the basis of ascertained merit and seniority in service and examination and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion. All examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination and the results thereof and the promotional eligible registers prepared therefrom shall be published by the Commission within 60 days after any examinations are held. . . . The Commission shall submit to the appointing power the names of not more than three applicants for each promotion having the highest rating except that a commission in any municipality with more than 130,000 but less than 2,000,000 population may submit the names of not more than five applicants having the highest rating for each promotion . . . ."

Section 25.1-5 of the Chicago Municipal Code requires the Commissioner of Personnel to issue personnel rules. Subsection 5 requires that the rules provide "[f]or the certification to an appointing authority of the names (a) of the five highest persons available on the appropriate eligible list to fill each vacancy, or (b) from the highest ranking group if the list is by rankings instead of numerical ratings." Chicago is a "home-rule" unit, and the Illinois Constitution provides that ordinances or rules promulgated by "home-rule" units supercede conflicting state statutes enacted prior to 1971 (as ¶ 10-1-13 was) (*see Messina v. City of Chicago*, 145 Ill. App. 3d 549, 495 N.E.2d 1228 (Ill. App. 1st Dist. 1986)). Thus, it appears that the five (rather than three) highest rated applicants are recommended for promotion.

any one of the four officers other than Earth who were recommended for promotion.

Earth protests that *Bigby* is not determinative because that case failed to address his claim that he is entitled not only to promotion, but to his ranking on the roster as originally posted. As stated above, even if he was entitled to the roster position he occupied prior to the correction of Gandurski's performance rating, it does not automatically follow that he was entitled by law to be promoted to sergeant. Moreover, nothing in the applicable statute or rule creates this alleged right to a particular roster ranking sufficient to constitute a "property" interest in the constitutional sense. As roster rankings are based, in part, on subjective, discretionary performance ratings, and a candidate for promotion has no legal "right" to a favorable performance rating from his superiors (*Bigby*, 766 F.2d at 1056), roster rankings are dependent upon the superior's perception of a candidate's performance at a given time and are at best uncertain. Because an officer cannot be assured that he will achieve a particular ranking on a given promotional roster, we fail to understand how he can assert that a particular ranking is "securely and durably" his under state law. *See Yatvin v. Madison Metro. School Dist.*, 840 F.2d 412, 417 (7th Cir. 1988). Moreover, in this case Earth presented no evidence that Gandurski's composite score was not, in fact, higher than his. Neither does an entitlement attach to a particular roster position by virtue of publication of the roster. Earth has neither identified nor cited any statute, rule or regulation that might be properly construed as creating a binding right to or property interest in a roster position, or as a promise that the City will not revise ranks after publication.[5]

[5] Earth's citation of Rule XII, Section 6 of the Chicago Personnel Rules is not persuasive. That section only limits the time within which an employee may request review of a performance evaluation. It does not limit in any way the City's discretion to revise roster rankings.

Nevertheless, Earth submits that this court confirmed the existence of a property right to a particular ranking in *United States v. City of Chicago*, 567 F.2d 730 (7th Cir. 1977). In that case, a number of white male candidates for Chicago patrolman positions claimed vested rights under Illinois law to be hired because their names appeared on the 1971 hiring roster. We rejected the claim on the ground that Illinois law did not require the Civil Service Commission to maintain an eligibility roster until all those listed had been appointed. Rather, the Commission could (and did in that case) simply strike an entrance level roster after it had been posted for two years. 567 F.2d at 733. In a footnote, which Earth relies upon, we observed

> "In comparison, a limitation does exist regarding the striking of a *promotional* roster in that it may be removed after two years only if all existing vacancies are filled prior to cancellation. Ill. Rev. Stat. ch. 24, § 10-1-13."

567 F.2d at 733 n.4 (emphasis in original).

Earth's reliance on the footnote above is misplaced. The City did not strike the 1979 promotional roster while vacancies existed. Nor was Earth's name removed from the list. At the time Gandurski was promoted over Earth, promotions to sergeant were being made from the 1979 roster and Earth's name appeared thereon, albeit with a corrected ranking.[6] Likewise, language in *United States v. City of Chicago*, 549 F.2d 415, 438 (7th Cir. 1977), also cited by Earth, to the effect that white, male officers "must be selected from the applicable eligibility rosters, in rank order," is of little benefit in this factual situation. Gandurski was promoted in rank order: Earth made no showing that Gandurski's revised ranking was im-

[6] Subsequent to Gandurski's promotion, on April 6, 1987, Judge Marshall advised the City that he would no longer approve promotions from the 1979 roster and suggested that the City offer a new promotion examination.

proper. The question is whether Earth was deprived of a constitutionally protected interest when the City altered Gandurski's ranking to move him ahead of Earth. The cases cited by Earth do not address that issue. But the message from *Bigby* and under Illinois law is clear: a roster ranking may create an expectation of promotion, but an officer has no entitlement to a particular roster position or to promotion. Neither Illinois law nor the Chicago Municipal Code entitle Earth to the challenged promotion much less to remain as the 56th highest ranking white male. We hold that appellant Earth was not deprived of a property interest when Gandurski was selected for promotion.

At oral argument, Earth suggested that Judge Marshall's reliance on a property right theory was merely an "alternative" holding. The court's primary holding, he argued, was that the City had violated the 1976 decree in altering the rankings without notice to the court. Earth submits that the court order directing his promotion was a legitimate exercise of the district judge's discretion to enforce his 1976 decree. Assuming that Judge Marshall's reliance on a property right theory was an alternative holding, we do not agree that Earth's promotion was a proper exercise of the district judge's discretion.

Earth was allowed to intervene in the underlying lawsuit, commenced in 1973 in an attempt to remedy alleged racial and sexual discrimination in the Chicago Police Department's hiring and promotional practices. Our previous decisions in the case upheld Judge Marshall's discretion to impose hiring and promotional quotas, and that discretion unquestionably extends to enforcement of those quotas. But this case contains no hint of racial or sexual discrimination. Gandurski, a white male, was selected for promotion instead of Earth, another white male.[7] Both

[7] Because both Earth and Gandurski are white males the City's revision of the roster rankings cannot of itself be classified as a clandestine attempt to avoid the minority or gender promotional

(Footnote continued on following page)

Earth and Gandurski were among the five highest rated applicants eligible for promotion and according to Illinois law and the Chicago Municipal Code the hiring authority was free to choose any one of those five candidates. The choice of Gandurski was a proper exercise of the promoting authority's discretion. Thus, it was error for the district judge, in the exercise of his discretion, to overrule the promoting authority's decision in the absence of a showing that Officer Gandurski was not properly among the five highest rated applicants. Judge Marshall did not find that Gandurski's revised ranking was improper (the judge simply noted that the City's objections to Earth's promotion "are not well founded"), and the record discloses that Earth made no such showing.

We hold that Earth has failed to establish a property interest in his original roster ranking, thus he is not entitled to promotion to sergeant. We also hold that Judge Marshall abused his discretion in ordering Earth's promotion in light of Earth's failure to establish that Gandurski's revised ranking was improper.

We reverse the district court and direct Judge Marshall or his successor to enter judgment in favor of the City of Chicago.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

[7] *continued*
quotas imposed by the court. This case therefore stands in contrast to petitions for intervention filed by black and hispanic officers, cited by appellant, complaining that the City changed their minority status or altered their roster ranking without notice.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1936

THOMAS W. EARTH,

Intervening-Plaintiff-Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 73 C 2080 – **Prentice H. Marshall,** *Judge*

[February 22, 1989]

JUDGMENT — ORAL ARGUMENT

HON. WALTER J. CUMMINGS, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this date.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 88-1936

THOMAS W. EARTH,

Intervening-Plaintiff-Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 73 C 2080 – **Prentice H. Marshall,** *Judge*

[May 5, 1989]

ORDER

HON. WALTER J. CUMMINGS, Chief Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by intervening-appellee, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

No. 73 C 2080 v.

CITY OF CHICAGO etc.,
et al.,

Defendants.

MICHAEL DRAWHORN,

Petitioning-Intervenor.

MEMORANDUM OPINION

Michael Drawhorn is a patrol officer in the Chicago Police Department. He is a black person. He held the promotion position of 1683 on the 1979 sergeant promotion roster. In December, 1986 defendant City of Chicago requested permission to promote 80 patrol officers to the rank of sergeant in accord with the then applicable 25% minority male/5% female/70% caucasian male ratios then in effect. Michael Drawhorn should have been promoted.

Shortly before the December 1986 promotions, and through a mysterious happenstance which could occur only in Chicago, Ralph Ford, a black patrol officer, obtained a "correction" which was made in his performance ratings for the year 1977 or 1978, which served to jump him over Michael Drawhorn. Drawhorn was not notified of this change in his status. He discovered it after inspecting the list which attended the promotion and comparing it to the promotion roster where, as he has stated, he was "unable to locate Mr. Ford."

Michael Drawhorn petitions to intervene pursuant ot Rule 23 F.R.C.P. The City does not object. His petition to

intervene as a plaintiff is granted.

Michael Drawhorn now requests an order from us directing the city to promote him to the rank of sergeant, despite our order of June 22, 1987 that no further promotions would be made from the 1979 sergeant roster. In response to this request, the City, in essence, says, "judge, do what you think is fair."

Michael Drawhorn is unlike a couple of other recent petitioners who sought promotion from old promotion lists. He has continuously been a member of the police department in contrast to those who were on leaves of absences serving as an alderman and an assistant state's attorney at the time of the promotions in question. Drawhorn was clearly entitled to promotion and he didn't receive it. At a minimum he was entitled to notice that Ford, who was not on the promotion roster, had succeeded in jumping Drawhorn, thus knocking Drawhorn out of a promotion.

The petition of intervening plaintiff Michael Drawhorn for promotion and other relief is granted. The defendant City of Chicago is ordered to promote Michael Drawhorn to the position of sergeant of police with full back pay, seniority and all benefits to December 6, 1986.

Dated: *November 30, 1987*

ENTER:

Prentice H. Marshall
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff

No. 73 C 2080 *v.*

CITY OF CHICAGO etc.,
et al.,

Defendants.

THOMAS EARTH,

Petitioning-Intervenor.

ORDER

Thomas W. Earth was ranked 536 on the 1979 Sergeants' promotion roster which we approved subject to promotional quotas which were adopted in April 1984 pursuant to the mandate of the court of appeals for this circuit. On December 1, 1986, Earth was number 56 among the white males awaiting promotion. On December 5, 1986, defendant promoted 56 white males, 20 minority males and 4 females. Earth should have made the promotion. He did not because on November 29, 1986 defendant had changed the position of Joseph Gandurski from number 577 to number 536 by a ten year retroactive correction of his performance rating without notice to Earth or the court. Consequently, Gandurski was promoted to the rank of sergeant as the 56th white male on December 5, 1986 and Earth missed the cut.

Earth has timely sought intervention to which the defendant does not object. Accordingly, his petition to intervene as of right pursuant to Rule 24(a)(2) F.R.C.P. is granted.

Defendant does object to Earth's petition for promotion and other relief. We have concluded that the objections are

not well founded and the petition should be granted. On December 17, 1986, it was represented to us that 80 promotions to the rank of sergeant had been made from the roster which we had earlier approved applying the quotas which had been adopted in April of 1984. We were not told that the roster had been altered with the result that Gandurski jumped Earth and Earth was excluded from promotion. Neither was Earth. Earth had a protectable interest in his position on the roster. He was deprived of that interest without any notice or opportunity to be heard. And we were induced to promote from a roster which had been altered without any notice to us. In these circumstances we believe equity compels that Earth be promoted to the rank of sergeant in the Chicago Police Department with full back pay and benefits to December 5, 1986.

Dated: *March 17, 1988*

ENTER:

Prentice H. Marshall
District Judge